

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
PORTLAND DIVISION

CHEHALEM PHYSICAL THERAPY, INC.)
and SOUTH WHIDBEY PHYSICAL
THERAPY AND SPORTS CLINIC,)

No. 03:09-cv-00320-HU

Plaintiffs,)

vs.)

COVENTRY HEALTH CARE, INC.,)

Defendant.)

**FINAL ORDER APPROVING
CLASS ACTION SETTLEMENT,
AND AWARING ATTORNEYS'
FEES, EXPENSES, AND
INCENTIVE AWARDS**

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12 HUBEL, Magistrate Judge:

13 This case concerns the proper interpretation of the reim-
14 bursement provisions of a preferred provider organization ("PPO")
15 agreement (the "Provider Agreement") between the plaintiffs and
16 First Health Group Corp. ("First Health"), a subsidiary of the
17 defendant Coventry Health Care, Inc. ("Coventry"). The plaintiffs
18 contracted with First Health to participate in the First Health
19 Provider Network - a PPO network maintained by First Health. At
20 issue in this case is whether Coventry properly calculated the
21 amount of reimbursements payable to the plaintiffs for workers'
22 compensation medical services under the terms of the Provider
23 Agreements.

24 On April 16, 2013, the court certified the following
25 Injunctive Class:

26 All health care providers who have a First
27 Health PPO Provider Agreement with a reim-
bursement procedure providing for the payment
of the lesser of (a) the billed charge, or (b)
28 a discount based on a percentage of the

1 maximum payable amount under the applicable
2 state's workers' compensation fee schedule
3 (after application of any applicable state
4 rules or guidelines) (hereafter referred to as
5 the "fee schedule maximum"), and who have had
a deduction from the billed charge when that
charge was less than the fee schedule maximum.
Excluded from the class are health care pro-
viders in the state of Louisiana.

6 Dkt. #209.

7 The parties conducted a comprehensive investigation of the
8 facts and law during the prosecution of this case including, *inter*
9 *alia*, the exchange and analysis of information pursuant to formal
10 and informal discovery requests, meetings and conferences, inter-
11 views of potential witnesses, and depositions. The parties'
12 counsel further investigated the applicable law as applied to the
13 facts discovered regarding the plaintiffs' claims, possible
14 defenses thereto, and the damages claimed by the plaintiffs.

15 The parties engaged in extensive settlement negotiations, and
16 attended mediation, ultimately culminating in a Settlement Agree-
17 ment (the "Settlement"). On April 1, 2014, the court entered an
18 Order Granting Motion for Preliminary Approval of Class Action
19 Settlement (the "Preliminary Approval Order"). Dkt. #245. Among
20 other things, the court conditionally certified, for settlement
21 purposes only, the following Settlement Class:

22 All health care providers who have or have had
23 a First Health provider agreement, whose
24 provider agreements have an Appendix A that
25 has the term "maximum amount payable" in the
26 reimbursement provision for reimbursement for
27 services rendered to occupationally ill or
28 injured employees, and who have had bills
discounted pursuant to the First Health
provider agreement during the class period,
March 25, 1999 through September 3, 2014, by
discounting the billed charge when the billed
charge was less than the applicable state or
federal fee schedule amount.

1 *Id.* The court preliminarily approved the Settlement as being
2 within the range of a fair, reasonable, and adequate settlement in
3 the best interests of the class; designated the two above-named
4 plaintiffs as Class Representatives; appointed Class Counsel;
5 established procedures for class members to opt out of or object to
6 the Settlement; approved as to form and content the Class Notice;
7 found that dissemination of the Class Notice as set forth in the
8 Settlement constituted the best notice practicable under the
9 circumstances; and scheduled a Fairness Hearing for September 3,
10 2014, for the court to determine whether a Final Order approving
11 the Settlement, and judgment thereon, should be entered. *Id.*

12 The court further ordered that Notice be sent to the
13 Settlement Class Members, and approved the forms and method of
14 disseminating the Notice and Claim Forms and Instructions. The
15 court found the contents of the Notice and manner of dissemination
16 satisfied the requirements of state and federal due process, and
17 the requirements of Federal Rule of Civil Procedure 23(c)(2)(B).
18 Dkt. ##245, 247.

19 The case came on for Fairness Hearing on September 3, 2014,
20 for the court's consideration of the parties' joint motion for
21 final approval of the Settlement. See Dkt. #252. The court has
22 considered the motion and all supporting documents submitted by the
23 parties, counsels' oral presentations at the Fairness Hearing, and
24 counsels' proposed language for this final order. Based on the
25 foregoing, IT IS HEREBY ORDERED as follows:

26 / /

27 / / /

28 / / /

This court has jurisdiction over the claims of the class members asserted in this proceeding, all parties to the action, and all matters related to the Settlement. Jurisdiction is predicated upon 28 U.S.C. § 1332, in that this is a civil action between citizens of different states, and the matter in controversy exceeds the sum of \$75,000. This court also has jurisdiction under 28 U.S.C. § 1711 *et seq.* and 28 U.S.C. § 1332(d), because the class members' claims collectively exceed the sum of \$5,000,000, exclusive of interest and costs, and a member of the class of plaintiffs is a citizen of a state different from Coventry. Venue is proper in the District of Oregon.

Compliance with Federal Rules of Civil Procedure

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Notice to Class Members

The court finds the Notice given to the Class Members fully and accurately informed them of all material elements of the Settlement, and of their opportunity to object thereto; was the best Notice practicable under the circumstances; was valid, due, and sufficient notice to all Class Members; and complied fully with the laws of the State of Oregon, the Federal Rules of Civil Procedure, the United States Constitution, due process, and other applicable law. A full opportunity has been afforded to all Class Members to object to the terms of the Settlement. Following Notice, no Class Members lodged objections. The court finds that only the nine Settlement Class Members identified in Exhibit A to this Final Order (the "Excluded Class Members") timely requested exclusion from the Settlement Class. Accordingly, the court finds and determines that all Class Members except the Excluded Class Members are bound by this Final Order, and the Excluded Class Members are hereby excluded from the Settlement Class and have no rights with respect to the Settlement.

In addition, a full opportunity was afforded to the Class Members to participate in the Fairness Hearing, and no Class Members appeared for the hearing.

Final Approval of Settlement

The court has carefully reviewed the Settlement, and finds the Settlement was the product of intensive, serious, informed, non-collusive, arm's-length negotiations; has no obvious deficiencies; and does not grant improper preferential treatment to any individuals. As directed by the Ninth Circuit Court of Appeals in *In*

1 re *Bluetooth Headset Products Liability Litigation*, 654 F.3d 935
2 (9th Cir. 2011), and its progeny, the court has considered: (a) the
3 strength of the plaintiffs' case; (b) the risk, expense, complexi-
4 ty, and likely duration of further litigation, including the risk
5 of maintaining class action status through the trial; (c) the
6 extensive investigation, discovery, and research conducted in the
7 case, such that counsel for all parties have been able to evaluate
8 their respective positions reasonably; (d) the substantial monetary
9 and other benefits offered in settlement; (e) the considerable
10 experience and favorable recommendations of counsel; (f) the lack
11 of any governmental participant in the case; (g) the overwhelmingly
12 positive reaction of the Settlement Class; (h) the absence of any
13 accusation or evidence of collusion among the settling parties; and
14 (i) the fact that the Settlement was negotiated after the court
15 certified an Injunctive Class. See *id.*, 654 F.3d at 946.

16 Pursuant to Federal Rule of Civil Procedure 23(e), the court
17 hereby grants the parties' motion for final approval of the
18 Settlement, and finds the Settlement to be fair, reasonable,
19 adequate, in the public interest, and in the best interests of the
20 Settlement Class. Accordingly, the Settlement is approved as of
21 the date of this Final Order, and the court hereby directs that the
22 settlement be effected in accordance with the terms of the
23 Settlement Agreement, and the terms and conditions set forth below.

24
25 ***Release of All Claims***

26 With this final approval of the proposed Settlement Agreement,
27 it is hereby ordered that (except with regard to the nine Excluded
28 Class Members, who are expressly excluded herefrom) the Settlement

1 is in full settlement, compromise, release, and discharge of the
2 plaintiffs' claims in this case, and Coventry has no further or
3 other liability or obligation to any member of the Settlement Class
4 with respect to the plaintiffs' claims in this action, except as
5 expressly provided for in the Settlement.

6
7 ***Incentive Awards***

8 "Incentive awards are fairly typical in class action cases."
9 *Rodriguez v. West Pub. Corp.*, 563 F.3d 948, 958 (9th Cir. 2009)
10 (citations omitted). "Such awards are discretionary . . . and are
11 intended to compensate class representatives for work done on
12 behalf of the class, to make up for financial or reputational risk
13 undertaken in bringing the action, and, sometimes, to recognize
14 their willingness to act as a private attorney general." *Id.*, 563
15 F.3d at 958-59.

16 The Ninth Circuit has expressed some concern about incentive
17 awards, particularly those that are excessive in comparison to the
18 recovery by individual class members. See *id.* (citing *Staton v.*
19 *Boeing Co.*, 327 F.3d 938, 977-78 (9th Cir. 2003)). The *Rodriguez*
20 court observed that individuals might be motivated to bring class
21 actions, rather than individual actions, "principally to increase
22 their own leverage to attain a remunerative settlement for them-
23 selves and then trading on that leverage in the course of negotia-
24 tions.'" *Id.*

25 In the present case, class counsel indicate the Class Repre-
26 sentatives participated actively throughout the litigation, and
27 were instrumental in assisting counsel in understanding the
28 underlying factual details, and in producing documents. The Class

1 Representatives devoted time and energy to the case during more
2 than five years of litigation, and their willingness to assert the
3 rights of Class Members has resulted in significant recovery for
4 the Settlement Class. The \$10,000 incentive award requested for
5 each Class Representative was proposed by the parties' mediator,
6 and accepted by the parties as reasonable. In addition, the
7 Settlement provides that the incentive awards will be paid in
8 addition to, rather than drawn from, the monetary benefits to the
9 Settlement Class.

10 The court finds that payment of an incentive award to the
11 Class Representatives is warranted in light of the benefits they
12 provided to the Settlement Class and Class Counsel. The court
13 orders payment of an incentive award in the amount of \$10,000 to
14 each of the Class Representatives.

15
16 ***Attorneys' Fees and Costs***

17 In cases that are not class actions, it is common for
18 contingency-fee agreements to specify an average fee of one-third
19 of the recovery. In class actions, the Ninth Circuit Court of
20 Appeals has established a 25% benchmark "as the standard for
21 effective representation . . . with appropriate departures for
22 'unusual circumstances.'" *Razilov v. Nationwide Mut. Ins. Co.*,
23 2006 WL 3312024, at *3 (D. Or. Nov. 13, 2006) (Brown, J) (quoting
24 *Paul, Johnson, Alston, & Hunt v. Graulity*, 886 F.2d 268, 273 (9th
25 Cir. 1989)); *Bluetooth*, 654 F.3d at 942 (citations omitted); *accord*
26 *Laguna*, 753 F.3d at 922 (citations omitted).

27 Here, class counsel are requesting combined attorney fees and
28 costs of \$2.6 million, representing "approximately 21% of the total

1 constructive Common Fund," and "approximately 23 percent of the
2 total \$11.3 million monetary value of the settlement[.]" Dkt.
3 #248, ECF p. 9 & n.1. As part of the Settlement, Coventry has
4 agreed to pay up to \$2.6 million in attorney fees and costs.
5 Nevertheless, Coventry's advance agreement "cannot relieve the
6 district court of its duty to assess fully the reasonableness of
7 the fee request." *Bluetooth*, 654 F.3d at 943-44 (citing *Staton v.*
8 *Boeing Co.*, 327 F.3d 938, 963-64 (9th Cir. 2003); *Knisley v.*
9 *Network Associates., Inc.*, 312 F.3d 1123, 1125 (9th Cir. 2002)).
10 The court has "an independent obligation to ensure that the award
11 [of attorney fees], like the settlement itself, is reasonable, even
12 if the parties have already agreed to an amount." *Bluetooth*, 654
13 F.3d at 941 (citations omitted).

14 There are two different methods the courts use to calculate a
15 reasonable attorney fee in a class action case. In cases "where
16 the relief sought is 'primarily injunctive in nature,' and a fee-
17 shifting statute authorizes 'the award of fees to ensure compensa-
18 tion for counsel undertaking socially beneficial litigation,'" the
19 Ninth Circuit has indicated the most appropriate fee calculation
20 method is the "lodestar method." *Laguna v. Coverall N. Am., Inc.*,
21 753 F.3d 918, 922 (9th Cir. 2014) (quoting *Bluetooth*, 345 F.3d at
22 941; citing *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1029 (9th Cir.
23 1998)). In applying the lodestar method, the court multiplies the
24 number of hours expended by counsel "by a reasonable hourly rate
25 for the region and for the experience of the lawyer[s]." *Blue-*
26 *tooth*, 543 F.3d at 941 (citation omitted). The lodestar method is
27 considered "presumptively reasonable," although it may be adjusted
28 upward or downward based on a variety of circumstances. *Id.*

1 In the second method, "[w]here a settlement produces a common
2 fund for the benefit of the entire class, courts have discretion to
3 employ either the lodestar method or the percentage-of-recovery
4 method." *Id.*, 345 F.3d at 942 (citing *In re Mercury Interactive*
5 *Corp.*, 618 F.3d 988, 992 (9th Cir. 2010) (citation omitted)). The
6 *Bluetooth* court explained that "[b]ecause the benefit to the class
7 is easily quantified in common-fund settlements, we have allowed
8 courts to award attorneys a percentage of the common fund in lieu
9 of the often more time-consuming task of calculating the lodestar."
10 *Id.*

11 In the present case, the court finds the percentage-of-the-
12 common fund method is appropriate. The court further finds the
13 requested 23% of the total monetary value of the settlement will
14 not "yield windfall profits for class counsel in light of the hours
15 spent on the case[.]" *Bluetooth*, 543 F.3d at 942; see *Zografos v.*
16 *Qwest Comm. Co., LLC*, 2013 WL 3766561, at *2 (D. Or. July 11, 2013)
17 (Aiken, CJ) ("Under the percentage-of-the-fund method, it is
18 appropriate to base the percentage on the gross cash benefits
19 available for class members to claim, plus the additional benefits
20 conferred on the class by the Settling Defendants' separate payment
21 of attorneys' fees and expenses, and the expense of administra-
22 tion.") (citing *Boeing Co. v. Van Gemert*, 444 U.S. 472, 479, 100
23 S. Ct. 745, 749-50, 62 L. Ed. 2d 676 (1980)). Here, Class Counsel
24 and paralegals expended over 6,700 hours during a period of more
25 than five years in representing the plaintiff class, and additional
26 time will be expended until the Settlement is fully administered.
27 In addition, Class Counsel have incurred more than \$150,000 in
28 costs in prosecuting the case. Class Counsel are highly experi-

1 ended in representing clients in class action lawsuits, and the
2 result achieved for the plaintiffs in this case is excellent.

3 Further, the requested 23% of the total settlement value is
4 manifestly reasonable, and falls below this court's percentage
5 attorney fee awards to class counsel in cases involving large
6 common funds. See, e.g., *Rausch v. Hartford Fin. Servs. Group*, 2007
7 WL 671334 (D. Or. Feb. 26, 2007) (Brown, J) (awarding 30% of
8 settlement fund); *Razilov, supra* (awarding 30 percent of \$19.25
9 million total settlement fund); *Mark v. Valley Ins. Co.*, 2005 WL
10 1334374 (D. Or. May 31, 2005) (Brown J) (awarding 30% of settlement
11 fund); *In re S. Pac. Funding Corp. Sec. Litig.*, No. 03:98-cv-01239-
12 MA, Dkt. #346, Order Awarding Plaintiffs' Counsel's Attorneys' Fees
13 and Reimbursement of Expenses (Feb. 21, 2001) (Marsh, J) (awarding
14 40% of cash award, and 30% of warrants); *In re Assisted Living*
15 *Concepts*, No. 06:99-cv-00167-AA, Dkt. #132 (Nov. 30, 2000) (Aiken,
16 J) (awarding 25% of \$30 million settlement); *Freedman v. Louisiana*
17 *Pac. Corp.*, No. 03:95-cv-00707-JO, Dkt. #182 (Feb. 12, 1997)
18 (Jones, J) (awarding 25% of \$65 million settlement).

19 Accordingly, the court **grants** the plaintiffs' counsels'
20 unopposed motion for attorney fees and expenses in the amount of
21 **\$2.6 million**, for all past and remaining work until the completion
22 of this matter. The court finds this award is fair and reasonable
23 under the circumstances.

24 25 ***Scheduling Order***

26 Assuming no timely appeal of this Final Order is filed, the
27 following deadlines will control in effectuating the Settlement:
28

1	Coventry to deposit \$5 million with Claims Administrator to fund the Guaranteed Fund	November 3, 2014
2		
3	Coventry to pay all attorney fees and costs awarded by the court	November 3, 2014
4	Coventry to deposit with Class Counsel all Incentive Awards ordered by the court	November 3, 2014
5		
6	Coventry to mail all Base Guaranteed Payments to Notified Class Members, with instructions on how to submit a claim for Additional Guaranteed Payment, and Individual Claim Payment	November 18, 2014
7		
8	Claims postmark deadline for Additional Guaranteed Payments and Individual Claim Payments	March 18, 2015
9		
10	Cure postmark deadline for timely claims	May 15, 2015
11		
12	Claims Administrator to inform Coventry of the amount to deposit for Individual Claim Payments	June 15, 2015
13		
14	Coventry to fund the Individual Claim Fund, up to \$3,500,000, based on approved claims for Individual Claim Payments as specified in the Settlement Agreement	June 30, 2015
15		
16	Coventry to mail all approved Additional Guaranteed Payments, and all approved Individual Claim Payments	July 15, 2015
17		

18 If a timely appeal of this Final Order is filed, then all of
19 the deadlines set forth above will be deemed stricken pending
20 resolution of the appeal. The parties are directed to notify the
21 court promptly when any appeal is resolved, at which time the court
22 will schedule a status conference to discuss further proceedings in
23 this matter.

24

25 ***Dismissal; Continuing Jurisdiction***

26 This case is hereby **dismissed with prejudice**. Without
27 affecting the finality of this Final Order and the Judgment entered
28 hereon, the court reserves continuing and exclusive jurisdiction

1 over all matters related to the administration and consummation of
2 the terms of the Settlement.

3 The Clerk of Court is directed to enter Judgment in this
4 action consistent with the terms of this Order.

5 IT IS SO ORDERED.

6 Dated this 3rd day of September, 2014.

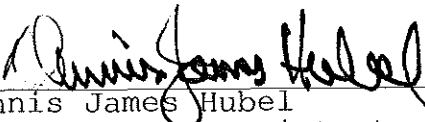
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9 _____
Dennis James Hubel
United States Magistrate Judge

EXHIBIT A - EXCLUDED CLASS MEMBERS

1. Advanced Therapy Solutions
8811 Warren H. Abernathy Way
Spartanburg, SC 29301
2. Gulf Coast Medical Center
11528 US Highway 19
Port Richey, FL 34668
3. Headache and Neurological Treatment Institute
2137 W. State Road 434
Longwood, FL 32779
4. Physical Therapy Associates of Tifton
1641 Madison Avenue
Tifton, GA 31794
5. Rose Radiology Centers
4133 Woodlands Parkway
Palm Harbor, FL 34685
6. Southern Maine Physical Therapy
449 Cottage Road
South Portland, ME 04106
7. Back in Motion Physical Therapy
94 Main Street
Gorham, ME 04038
8. Greater Brunswick Physical Therapy
11 Bowdoin Mill Island, Suite 220
Topsham, ME 04086
9. Peter Cooper
110 Portland Street
Yarmouth, ME 04096